LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 21 1963
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 324

TIME, INCORPORATED, *Petitioner*,

v.

FRANK PAPE, *Respondent*.

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ROGER Q. WHITE,
141 West Jackson Boulevard,
Chicago 4, Illinois,
Attorney for Respondent,
Frank Pape

LUIS KUTNER,
JOHN M. KAVENY,
Of Counsel.

INDEX

	Page
Statement of the Case	1
Argument	2
Conclusion	6

CITATIONS

Cases:

Beauharnais v. Illinois, 343 U.S. 250 (1952)	3
Beck v. Washington, 369 U.S. 541 (1962)	3
Edelman v. California, 344 U.S. 357 (1953)	3
Ellis v. Dixon, 349 U.S. 458 (1955)	3
Polizzi v. Cowles Magazines, Inc., 345 U.S. 663 (1953)	3
United States v. Fleischman, 339 U.S. 349 (1950)	3
Wolf v. North Carolina, 364 U.S. 177 (1960)	3
Yates v. United States, 354 U.S. 298 (1957)	4

Statutes:

Civil Rights Act, R.S. sec. 1979, 42 U.S.C.A. 1983	5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 324

TIME, INCORPORATED, *Petitioner,*

v.

FRANK PAPE, *Respondent.*

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Statement of the Case

While the *Time* article quoted in part the language of the Report of the U.S. Commission on Civil Rights [admittedly privileged], the Court of Appeals said that by the rewording the Report and deleting words, *Time* took the risk that it might go too far.

> "A jury could find that Time went beyond the limits of fairness here and in doing so was not protected by its privilege of fair comment, and that in making its article more interesting and readable for its audience, it departed from fidelity to the Commission Report. It is our opinion that a jury could read the Time ar-

ticle as stating that the Report said Pape and his fellow officers *did* what the Commission Report merely said the *Monroe* complaint *alleged they did.*" [emphasis the Court's] [R. 65]

In his complaint, Pape did not limit himself to alleging that Time's article charged him with violating Monroe's civil rights, as implied on page 5 of *Time's* petition. Pape charged that the articles stated that he had been guilty of criminal assault, intimidation, and brutality, in his treatment of the James Monroe family.

ARGUMENT

Reasons Why the Writ Should Not Be Granted

I

The question of the relevance of the judgment in Monroe v. Pape was not properly raised in the Court of Appeals, and this Court will not pass upon an issue not properly raised below.

Until its petition for rehearing, petitioner, neither by motion or otherwise, raised the question it now presses on this Court, i.e., that the Court Appeals should rule on the admissibility and relevance of the judgment entered in *Monroe* v. *Pape* as a part of petitioner's defense in the trial of this case.

Subsequent to oral argument in the Court of Appeals, petitioner moved to dismiss this cause as moot because of the judgment rendered in *Monroe* v. *Pape* [R. 3-5]. In its "Suggestions in Support of Its Motion," petitioner, at paragraph 3, states that the effect of the judgment of *Monroe* v. *Pape* is to find Pape guilty of violating Monroe's civil rights, which proves its article substantially true.

Therefore, the Court was asked to dismiss the appeal as moot. Nowhere in its motion does petitioner ask the Court to consider the *Monroe* v. *Pape* judgment for any purpose except to dismiss this cause for mootness.

Pape filed a copy of the original *Monroe* v. *Pape* complaint with his objection to petitioner's motion [R. 33]. The allegations of this complaint were quoted in *5 Justice* and by petitioner in the article in question. Respondent pointed out to the Court of Appeals the significant differences between this original complaint and the second amended complaint on which judgment was ultimately rendered. Petitioner filed a reply to this [R. 57] in which it was claimed that the "substantial truth" of the article had been proved by the verdict in *Monroe* v. *Pape*, and the Court Appeals should therefore dismiss this case as moot.

In its petition for rehearing, petitioner, for the first time, asked the Court to rule on the relevance of the judgment in *Monroe* v. *Pape* [R. 71]. This Court has held that it will not grant a petition for writ of certiorari where the question raised in the petition was not timely and properly raised below. *Wolf* v. *North Carolina*, 364 U.S. 177 [1960]; *Ellis* v. *Dixon*, 349 U.S. 458 [1955]; *Edelman* v. *California*, 344 U.S. 357 [1953]; *Beauharnais* v. *Illinois*, 343 U.S. 259 [1952]. See also: *Beck* v. *Washington*, 369 U.S. 541 [1962]; *Polizzi* v. *Cowles Magazines, Inc.*, 345 U.S. 663 [1953]; *United States* v. *Fleischman*, 339 U.S. 349 [1950].

II

The judgment in Monroe v. Pape is not relevant to the issues raised in these proceedings

In what petitioner calls "a single cryptic paragraph" on page 2 of its petition, the Court of Appeals denied the motion to dismiss respondent's appeal on the ground of moot-

ness. The Court of Appeals then had before it both the *Time* article which is the basis of this lawsuit, and the second amended complaint in *Monroe* v. *Pape*, in which judgment had just been entered against Pape. The Court of Appeals opinion specificially states [R. 66] that it was taking judicial notice of the verdict and judgment in *Monroe* v. *Pape*. It then denied petitioner's motion to dismiss this cause for mootness. There is nothing cryptic about it. The Court of Appeals obviously understood that the charges set forth in the *Time* article were so different from the allegations in the second amended complaint in *Monroe* v. Pape that the verdict and judgment in that case were irrelevant to the claimed libel and could not render this cause moot.

What petitioner really urged in its petition for rehearing and urges here, is collateral estoppel. If successful, its whole defense is the record of the jury's verdict in *Monroe* v. *Pape*.

In *Yates* v. *United States*, 354 U.S. 298 [1957], the Court discussed the doctrine of collateral estoppel and, at page 336, says:

> "That doctrine makes conclusive in subsequent proceedings only determinations of fact and mixed fact and law that were essential to the decision."

Thereafter, on page 338, the same opinion, the Court says:

> "The normal rule is that a prior judgment need be given no conclusive effect at all unless it establishes one of the ultimate facts of an issue in the subsequent proceedings. So far as merely evidentiary or 'mediate' facts are concerned, the doctrine of collateral estoppel is inoperative. *The Evergreen* v. *Naman*, 142 F. 2d

927; Restatement, Judgments, sec. 68, comment *p*. *Cf Bordonaro Brothers Theatres, Inc.* v. *Paramount Pictures, Inc.*, 203 F. 2d 676, 678."

In both the original and amended complaints in *Monroe* v. *Pape*, jurisdiction of the Federal Court was based upon 42 U.S.A., sec. 1983, which provides that "every person who, under color of any statute . . . of any state . . . subjects . . ", any citizen of the United States . . . within the jurisdiction thereof [to] the deprivation of any rights . . . secured by the Constitution and laws shall be liable to the party injured in an action . . . or other proper proceedings for redress."

The verdict in *Monroe* v. *Pape*, if applicable to these proceedings at all under the doctrine of collateral estoppel, is of value only in its holding that Pape violated Monroe's rights reserved to him under 42 U.S.C.A. 1983. The verdict in no way found the evidentiary or 'mediate' facts which petitioner presses upon the Court in these proceedings e.g., that Pape was guilty of assault, intimidation and brutality. It is submitted that the Court of Appeals, having before it both the original complaint and the second amended complaint, ruled on the relevance of the judgment in *Monroe* v. *Pape* in line with the foregoing authorities.

Petitioner argues that to avoid undue restrictions upon freedom of the press, the Court must adopt the so-called "innocent construction" rule and find that the "gist" or "sting" of the *Time* article was merely that Pape had violated Monroe's civil rights, rather than having committed specific acts of police brutality. The Court of Appeals disposed of this argument as follows:

> "Time argues that the 'innocent construction' rule requires this court to read the article 'innocently,' citing *John* v. *Tribune Co.*, 24 Ill. 2d 437, 442, 181 N.E. 2d 105,

108 [1962]. We are required by the rule in that case to give the Time article its 'natural and obvious meaning.' To read the article innocently, Time asks us to read the article as *not* saying what it does say. It says that the Civil Rights Commission said that Pape had, among other things assaulted the Monroe family and violated their civil rights. In fact, the Commission said that a complaint in a civil action *alleged* that Pape had done those things." [emphasis the Court's] [R. 66]

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

ROGER Q. WHITE,
141 West Jackson Boulevard,
Chicago 4, Illinois,
Attorney for Respondent,
Frank Pape

LUIS KUTNER,
JOHN M. KAVENY,
Of Counsel.